

CFPB Challenges Financial Institutions to Produce Evidence of Affirmative Consent to Overdraft Fees

September 19, 2024

On September 17, 2024, the [Consumer Financial Protection Bureau \(CFPB\) issued a circular](#) explaining that financial institutions may violate the Electronic Fund Transfer Act (EFTA) and its implementing regulation, Regulation E, by charging consumers certain overdraft fees without affirmative proof of consumer consent to be charged overdraft fees. The circular highlights the importance of maintaining evidence of an individual consumer's consent to overdraft services and incurring the resulting fees. In a footnote to the circular, the CFPB opines that Regulation E's two-year record retention requirement is an "independent legal obligation," and it does not change the fact that an "absence of records" – presumably even if the record retention period has expired – is still "suggestive that a consumer did not opt in."

Financial institutions carry burden of proof prior to levying overdraft fees

The EFTA and Regulation E prohibit financial institutions from charging overdraft fees on ATM and one-time debit card transactions without the consumer's affirmative consent. Specifically, Regulation E requires financial institutions to:

- Provide consumers a reasonable opportunity to affirmatively consent, or opt in, to overdraft services.
- Obtain the affirmative consent from the consumer before charging the consumer any overdraft fees.
- Provide the consumer with confirmation of the consent that includes a statement informing the consumer of their right to revoke that consent.

The circular notes the CFPB has found in examinations that financial institutions maintain policies and procedures consistent with Regulation E's opt-in requirements, but that in certain circumstances, they could not provide evidence of a specific consumer's affirmative consent. The CFPB further indicated it concluded in certain instances that a financial institution improperly obtained consent through deceptive or abusive practices.

To address this concern, the CFPB opines that acceptable evidence a consumer has opted in to overdraft services includes retaining a:

- Copy of signed or initialed form by consumer indicating the consumer's affirmative consent to opting in to covered overdraft services.
- Recording of the phone call in which the consumer elected to opt in to covered overdraft services.
- Securely stored and unalterable electronic signature demonstrating the consumer's assent to affirmatively opt in to covered overdraft services along with the date the consumer opted in.

The circular suggests that institutions disposing of evidence of compliance outside Regulation E's two-year record retention period may be unable to prove the consumer opted in to overdraft services, in which case the consumer must be treated as not having opted in.

Looking ahead

The circular is the latest of many CFPB interpretations aimed at curtailing fee assessment, and it follows several public enforcement actions related to overdraft fee practices. In January 2024, the CFPB issued a [proposal that would require large banks to treat overdraft services as credit subject to Regulation Z](#), and in July 2024, the CFPB [warned banks against assessing fees for providing information services to consumers](#) as part of its update on implementation of its Section 1034(c) advisory opinion. Financial institutions may need to review their overdraft and record retention policies in light of the circular, as the CFPB continues to focus on fee assessment practices and overdraft in particular.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our [legal notices](#).

Key Contacts

Obrea Poindexter Washington, DC	opoindexter@cooley.com +1 202 776 2997
Michelle L. Rogers Washington, DC	mrogers@cooley.com +1 202 776 2227
Christine Thebaud Washington, DC	cthebaud@cooley.com +1 202 776 2095

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.